SUPREME COURT, U. S.

FEB 15 1967

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 853.

SERROL DUBIN,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, LAKE COUNTY, OHIO (SEVENTH OHIO APPELLATE DISTRICT).

BRIEF OF RESPONDENT IN OPPOSITION.

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BRIEF OF RESPONDENT IN OPPOSITION.

STATEMENT OF THE CASE.

Respondent agrees with petitioner's statement of the case, but objects to the argumentative manner in which petitioner inserts *facts* into this statement. Petitioner characterizes the State's evidence as "* * * wholly and tenuously circumstantial." (See page 7 of the Petition.) Petitioner characterizes the testimony of a State's witness as being "* * * exceedingly bizarre." (See page 7 of the Petition.)

In presenting the questions to this Court, it was unnecessary for petitioner to allude to the evidence. The issue concerns appellate procedure under the Constitution of the State of Ohio. The evidence was so "wholly and tenuously circumstantial" and the testimony so "exceedingly bizarre" that a jury of twelve of defendant's peers

returned a unanimous verdict of "guilty" (page 23 Appendix to Petition) and the trial judge entered a judgment of imprisonment upon said verdict. (Page 23 Appendix to Petition.)

ARGUMENT.

QUESTION NO. 1.

Petitioner would have this Court declare Article IV, Section 6, Constitution of the State of Ohio (1851), unconstitutional as being repugnant to the equal protection of laws provision of the Fourteenth Amendment to the Constitution of the United States. The State Constitution prohibits the Court of Appeals from setting aside or reversing a judgment of a court of record upon the weight of the evidence except by the concurrence of all three judges of the Court of Appeals (See Article IV, Section 6, Constitution of the State of Ohio at page 4 of the Petition). The Supreme Court of Ohio as recently as 1961, reversed a Court of Appeals' decision in which the Court of Appeals, by vote or two to one, reversed a trial court where said appellate reversal was upon the weight of the evidence and the judgment of the trial court was entered upon the verdict of a jury. *State vs. Pope,* 171 Ohio St. 439 (1961).

Petitioner suggests that this provision of the Ohio Constitution results in a classification that is arbitrary, unnatural, capricious and unreasonable. The Ohio Constitutional provision is limited in its application and thus classifies all defendants who come before the criminal bar. It is necessary to examine the basis of the classification. The Ohio Constitutional proscription is limited to cases in which the Court of Appeals is weighing the evidence in a case where a verdict was returned by a jury. The task of weighing evidence is not one of those tasks that through-

out the growth and development of the law has been placed exclusively within the province of judges. On the contrary, the task of weighing evidence is left almost exclusively in the hands of juries. There are rare instances in the law where factual determinations are made by judges. The bulk of factual findings in the law are made by those unschooled in the profession of the law. The exceptions to this rule are in matters where fines, sentences and amounts of money involved in litigation are insubstantial. In these cases, our laws permit judges to make factual determinations in spite of a Constitutional provision guaranteeing the right to trial by jury. (Appendix: Constitution of Ohio, 1851, Article I, Section 5.) Under modern codes, judges in equity jurisdiction call juries to determine questions of fact in traditional equity cases. (Appendix: Section 2311.04 Revised Code of Ohio.) Under the Ohio law, all persons accused of committing a crime have a right to be tried by a jury. Under Section 2945.05 of the Revised Code of Ohio (Appendix), the accused may waive this right but only by explicitly following the procedures set forth in the statute. (Appendix: Section 2945.06 of the Revised Code of Ohio.) The question of waiver is solely in the hands of the accused and he may withdraw his waiver at any time prior to the commencement of his trial. (Appendix: Section 2945.05 Revised Code of Ohio.) After indictment and before trial, petitioner herein stood in precisely the same position in law as every other person in the State of Ohio that is charged with the commission of a crime. Does Article IV, Section 6 of the State Constitution classify in an arbitrary, unnatural, capricious and unreasonable manner? This Constitutional provision is founded in the belief by the people of the State that jury factual findings should not be disturbed by judges unless there be unanimity of the judges

on review. The principle takes its roots in the Constitutional guarantee of trial by jury and in the Common Law concept that pure questions of fact may be more ably determined by laymen than judges. The people of the State of Ohio in constitutionally allocating the judicial powers of government have indicated that questions of fact determined by laymen shall be given more weight on judicial review than where judges make the initial determination of fact. This concept is natural and reasonable.

In his concurring opinion in the case of *Griffin vs. Illinois*, 351 U. S. 12, 100 L. Ed. 891, 76 Sup. Ct. 585 (1956), Mr. Justice Frankfurter stated the matter as follows, at page 21 of United States Report of the case:

> "Nor does equal protection of the laws deny a State the right to make qualifications in law when such qualifications are rooted in reason."

The qualification of the State Constitution not only is rooted in reason but is based upon the guarantee of a right to trial by jury contained in another provision of the very Constitution that petitioner seeks to invoke.

The petitioner was convicted by a jury, i.e. twelve triers of the fact. Two judges on the Court of Appeals have disagreed with this verdict. However, two judges, including the one present at the trial, have held that the verdict was reasonable. The situation presented by a jury verdict with fourteen people agreeing with petitioner's conviction has many differences, not the least of which is numerical, from the situation where a defendant is convicted only by a trial judge or a three-judge court. In the latter case a question in the minds of at least two reviewing judges of the Ohio Court of Appeals would seem a rational basis for reversal.

The State Constitutional provision does not deny to petitioner equal protection under the laws.

QUESTION NO. 2.

Petitioner suggests that the three judge concurrence doctrine of the State Constitution offends the due process clause of the United States Constitution. Petitioner evidently believes that the due process clause of the Federal Constitution requires that an appeal be permitted in State Court criminal cases. This is not so. The Federal Constitution does not require that the States afford a defendant an appeal from a criminal conviction. *McKane vs. Durston*, 153 U. S. 684 (1894). It follows that if a State may constitutionally deny an appeal completely, it can impose restrictions on an appeal that may be granted.

Petitioner argues that to imprison a man in a case wherein the verdict is against the weight of the evidence is repugnant to the due process clause. This is, of course, a truism, but points out the circular nature of petitioner's reasoning. Under Ohio Law a verdict is not against the weight of the evidence, unless the trial judge or three judges of the Court of Appeals determine it so to be. The three judges of the Court of Appeals signed the journal entry of that Court in affirming the judgment below. (See: Petition for Certiorari at pages 39 and 40.)

The same argument presented under Question No. 1 as to the reasonable and natural basis for the sanctity of jury findings is adopted in support of the due process argument herein.

There is no debatable issue for this Court to review under the United States Constitution.

It is respectfully submitted that petitioner's Petition for Writ of Certiorari be denied.

FRED V. SKOK,
Prosecuting Attorney,
DAVID P. FREED,
Special Assistant Prosecuting Attorney,
Counsel for Respondent.

APPENDIX.

Constitution of Ohio, 1851, Article I, Section 5.
(Trial by Jury; Reform in Civil Jury System.)

"The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury. (As amended September 3, 1912.)"

Revised Code of Ohio, Section 2311.04.
(Trial of issues.)

"Issues of law must be tried by the court, unless referred as provided in sections 2315.26 to 2315.36, inclusive, of the Revised Code. Issues of fact arising in actions for the recovery of money only, or specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference is ordered as provided in such sections.

All other issues of fact shall be tried by the court, subject to its power to order any issue to be tried by a jury, or referred."

Revised Code of Ohio, Section 2945.05.
(Defendant may waive jury trial.)

"In all criminal cases pending in courts of record in this state, the defendant may waive a trial by jury and be tried by the court without a jury. Such waiver by a defendant, shall be in writing, signed by the defendant, and filed in said cause and made a part of the record thereof. It shall be entitled in the court and cause, and in substance as follows: 'I _____, defendant in the above cause, hereby voluntarily waive and relinquish my

right to a trial by jury, and elect to be tried by a Judge of the Court in which the said cause may be pending. I fully understand that under the laws of this state, I have a constitutional right to a trial by jury.'

Such waiver of trial by jury must be made in open court after the defendant has been arraigned and has had opportunity to consult with counsel. Such waiver may be withdrawn by the defendant at any time before the commencement of the trial."

Revised Code of Ohio, Section 2945.06.
(Jurisdiction of judge when jury trial is waived; three-judge court.)

"In any case in which a defendant waives his right to trial by jury and elects to be tried by the court under section 2945.05 of the Revised Code, any judge of the court in which such cause is pending shall proceed to hear, try, and determine such cause in accordance with the rules and in like manner as if such cause were being tried before a jury. If the accused is charged with an offense punishable with death, he shall be tried by a court to be composed of three judges, consisting of the judge presiding at the time on the trial of criminal cases and two other judges to be designated by the presiding judge or chief justice of said court, and in case there is neither presiding judge nor chief justice, by the chief justice of the supreme court. Such judges or a majority of them may decide all questions of fact and law arising upon the trial, and render judgment accordingly. If the accused pleads guilty of murder in the first degree, a court composed of three judges shall examine the witnesses, determine the degree of crime, and pronounce sentence accordingly. In rendering judgment of conviction of an offense punishable

by death upon plea of guilty, or after trial by the court without the intervention of a jury, the court may extend mercy and reduce the punishment for such offense to life imprisonment in like manner as upon recommendation of mercy by a jury. If in the composition of said court it is necessary that a judge from another county be assigned by the chief justice, such judge shall be compensated for his services as provided by section 141.07 of the Revised Code."